A **SOON YEE LING & ANOR**

v.

LIM AH HUN

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
ZULKEFLI MAKINUDIN FCJ
MOHD GHAZALI YUSOFF FCJ
[CIVIL APPEAL NO: 02-33-2006(P)]
C 4 DECEMBER 2009

CONTRACT: *Sale and purchase of land - Charged land - Purchaser failed to redeem land from chargee within agreed date - Vendor terminated agreement and forfeited deposit before completion date for*
D *payment of balance purchase price - Whether vendor entitled to do so - Contracts Act 1950, s. 56(1)*

The appellants as vendors of certain pieces of land ('lands') terminated a sale and purchase agreement ('SPA') with the
E respondent as purchasers and forfeited the deposit sum paid by the respondent on the ground that the respondent failed to pay the redemption sum to the chargee banks within an agreed date. This was before the SPA's completion date for payment of the balance purchase price. The High Court held that the appellants
F were entitled to terminate the SPA and forfeit the deposit sum. The Court of Appeal reversed the High Court's finding on the ground that there was no provision in the SPA for the consequences of a default in payment of redemption monies as there was for a default in payment of the balance purchase price
G (see p 850 of this journal). Hence, the appellants' appeal.

Held (allowing the appeal):
Per Arifin Zakaria CJ (Malaya) delivering the judgment of the court:

H **(1)** The agreed purchase price was RM1,600,992.20 and the deposit of RM264,992 was paid by the respondent upon the execution of the SPA leaving a balance of RM1,336,000 to be paid by the respondent. Out of the balance sum it was agreed that the respondent pay the full redemption for the lands to
I the bank within the stipulated time. That was contained in

cl. 2 of the Fourth Schedule. For that reason, it was erroneous to treat the redemption sum as separate from the balance purchase price. The redemption sum constituted the bulk of the purchase price and was the balance purchase price. Any failure on the part of the respondent to pay the redemption sum in accordance with cl. 2 of the SPA's Fourth Schedule tantamount to the respondent's failure to pay the balance of the purchase price. That certainly constituted a breach of the SPA. (paras 15 & 16)

(2) The consequence of breach of the SPA was provided in cl. 8 therein which allowed the vendor to forfeit the deposit on the purchaser's failure to pay the balance purchase price. Further, the parties to the SPA had agreed that time was of the essence of the SPA as per cl. 22 SPA. That brought into play s. 56(1) of the Contracts Act 1950. As the respondent failed to pay the redemption sum on the promised date, the SPA became voidable at the option of the appellants. (paras 17 & 18)

(3) The appellants had given notice to the respondent to terminate the SPA and forfeit the deposit sum as per cl. 11 of the SPA's First Schedule. That was in accord with the terms and conditions of the SPA (See *Yeow Kim Pong Realty Bhd v. Ng Kim Pong*; *Linggi Plantations Ltd v. Jagatheesan*; *Lee Ywe Hin v. Kow Lup Piow*). (paras 19 & 20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu selaku penjual beberapa bidang tanah ('tanah-tanah') telah menamatkan perjanjian jual beli ('SPA') dengan responden selaku pembeli dan merampas wang deposit yang dibayar oleh responden atas alasan responden gagal membayar wang tebusan kepada bank pemegang gadaian dalam tempoh yang ditetapkan. Ini dilakukan sebelum berakhirnya tempoh penyempurnaan bayaran seperti yang ditetapkan di dalam SPA. Mahkamah Tinggi memutuskan bahawa perayu-perayu berhak menamatkan SPA dan merampas wang deposit. Mahkamah Rayuan bagaimanapun mengakas keputusan Mahkamah Tinggi atas alasan bahawa tidak terdapat peruntukan di dalam SPA mengenai akibat kepada kegagalan membayar wang tebusan, berbanding dengan

peruntukan mengenai kegagalan membayar harga belian yang jelas diperuntukkan di dalam SPA (lihat ms 850 jurnal ini). Perayu telah merayu terhadap keputusan tersebut.

Diputuskan (membenarkan rayuan):

Oleh Arifin Zakaria HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Harga yang dipersetujui adalah RM1,600,992.20 dan deposit RM264,992 telah dibayar oleh responden apabila memeterai SPA dengan meninggalkan baki sebanyak RM1,336,000 lagi yang perlu dibayar oleh responden. Dari jumlah baki tersebut, telah dipersetujui bahawa responden akan membayar sepenuhnya wang tebusan tanah-tanah kepada bank dalam tempoh yang ditetapkan. Wang tebusan mewakili sebahagian besar harga belian, dan malah adalah bersamaan jumlahnya dengan baki harga belian. Sebarang kegagalan oleh responden untuk membayar jumlah tebusan di bawah Jadual Keempat kl. 2 SPA akan bererti kegagalan membayar baki harga belian. Dan itu adalah satu kemungkiran di bawah SPA.

(2) Akibat dari kemungkiran terhadap SPA, ada diperuntukkan di dalam kl. 8 nya, di mana ia membenarkan penjual merampas deposit atas kegagalan pembeli membayar baki harga belian. Selain itu, pihak-pihak kepada SPA bersetuju bahawa masa adalah intipati SPA seperti yang dinyatakan di kl. 22 SPA. Ini sekaligus menarik peranan s. 56(1) Akta Kontrak 1950. Oleh kerana responden gagal membayar wang tebusan pada tarikh yang dijanjikan, maka SPA menjadi boleh dibatal atas pilihan perayu-perayu.

(3) Perayu-perayu telah memberi notis kepada responden untuk menamatkan SPA dan merampas wang deposit seperti kehendak kl. 11 Jadual Pertama SPA. Ia adalah selaras dengan terma-terma dan syarat SPA. (Lihat *Yeow Kim Pong Realty Bhd v. Ng Kim Pong*; *Linggi Plantations Ltd v. Jagatheesan*; *Lee Ywe Hin v. Kow Lup Piow*).

Case(s) referred to:
Lee Yew Hin v. Kow Lup Piow [1974] 1 MLJ 114 FC ***(refd)***
Linggi Plantations Ltd v. Jagatheesan [1972] 1 MLJ 89 PC ***(refd)***
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC ***(refd)***
UOL Credit Sdn Bhd v. Dato' Vijay Kumar Natarajan [2010] 1 CLJ 557 FC ***(refd)***
Yeow Kim Pong Realty Bhd v. Ng Kim Pong [1962] MLJ 118 PC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 56(1)
Courts of Judicature Act 1964, s. 96(a)

For the appellants - Mureli Navaratnam (Viji Navaratnam with him); M/s Mohd Imtiaz Chong & Partners
For the respondent - K Balasundram (Jason Ong with him); M/s Ong & Advoc

[Editor's note: For the Court of Appeal judgment published in the same journal, please see Lim Ah Hun v. Soon Yee Ling & Anor [2010] 2 CLJ 850.]

Reported by Usha Thiagarajah

JUDGMENT

Arifin Zakaria CJ (Malaya):

Introduction

[1] In this appeal two questions were posed to this court which reads:

(a) Whether the appellants are entitled to terminate the sale and purchase agreement and to forfeit the deposit for the non-compliance by the respondent of the condition to redeem the property within the time stipulated notwithstanding there being time thereafter for the completion of the entire contract; and

(b) Whether the respondent is entitled to insist on the appellants continuing with the sale and purchase agreement when the respondent himself failed to perform his obligation to redeem the property within the stipulated time.

Preliminary Objections

[2] At the outset of this appeal, the following issues were raised by way of preliminary objection, namely:

(a) The questions of law posed to the Federal Court do not come within the ambit of s. 96(a) of the Courts of Judicature Act ("CJA");

(b) The questions of law posed to the Federal Court do not relate to a matter in respect of which a determination has been made by the Court of Appeal; and

(c) The fact situation envisaged by the questions posed to the Federal Court is only peculiar to this appeal.

[3] It is trite law that this court has the jurisdiction to reconsider the leave granted by another panel. The late Justice Abdul Malek Ahmad, FCJ (as he then was) in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349 FC observed as follows:

> The authorities showed that this court was not prevented from reconsidering the issue of leave again. The questions formulated for determination by this court were not of importance and public advantage. The questions merely relate to a set of facts in the appeal and the application of settled principles of law. Therefore, they did not come within the ambit of s. 96(a) of the Courts of Judicature Act 1964. It followed that there was no necessity for this court to answer the questions posed regardless of the fact that leave to appeal had been granted.

(See *UOL Credit Sdn Bhd v. Dato' Vijay Kumar Natarajan* [2010] 1 CLJ 557 FC).

[4] Having considered the submissions of counsel we find no reason which warranted us to review the leave granted by the earlier panel of this court. Accordingly we dismissed the preliminary objection with costs. We proceeded to hear the appeal on 4 November 2009.

Background Facts

[5] The facts in this case are not in dispute. They are briefly as follows: The appellants are the owners of three pieces of land known as Lot Nos. 201, 202 and 203, Section 9W, Town of Georgetown, North East District, Penang comprised in Grant Nos. 17901, 17902 and 9992 respectively ("the lands").

[6] The appellants and the respondent entered into an agreement dated 11 April 2000 ("the SPA") whereby the respondent agreed to purchase the lands at the agreed price of RM1,600,992.20. The respondent paid a deposit of RM264,992 leaving a balance sum of RM1,336,000.

[7] At the material time, the lands were charged to the Asia Commercial Finance (M) Bhd and Standard Chartered Bank Malaysia Bhd ("the banks").

[8] To finance the purchase of the lands, the respondent applied to Ban Hin Lee Bank Bhd for a loan of RM800,000. The loan was approved on 26 June 2000. However, until 21 July 2000, ie, the date of the termination of the agreement, the lands had not been redeemed by the respondent.

[9] Under cl. 22 of the SPA, time shall be of essence of the agreement.

[10] Taking the date of the agreement as 11 April 2000, the respondent is required to redeem the lands on or before 11 July 2000 (sixty days plus one month extension). The respondent failed to do so. On that premise the appellants contended that the respondent had committed a breach of the SPA. The appellants then through their solicitor by letter dated 21 July 2000 gave notice to the respondent terminating the SPA and forfeiting the deposit as provided in section 11 of the First Schedule of the SPA.

The Issue

[11] The main issue before us is whether the failure of the respondent to pay the redemption sum within the time stipulated entitles the appellants to rescind the SPA and forfeit the amount of deposit as provided in s. 11 of the First Schedule ("forfeitable deposit").

[12] The learned High Court Judge in his brief grounds of judgment agreed with the appellants. His reasons are as follows:

> Adalah diteliti bahawa Plaintif hendaklah menebus tanah hartanah itu dalam masa 2 bulan iaitu pada 10.6.2000 jika gagal Plaintif diberi perlanjutan masa satu (1) bulan lagi sehingga 10.7.2000. Nampaknya Plaintif tidak membuat apa-apa dan tidak memberitahu

A Defendan apa-apa apabila sampai tempoh 10.6.2000 mahupun sampai tempoh luput 10.7.2000. Plaintif hanya bertindak meminta dokumen-dokumen dari Defendan pada 21.7.2000 selepas luput tarikh seolah-olah kelewatan itu tidak berkesan dan masa bukan intipati. Maka Defendan berhak bertindak menurut terma dan
B hasrat Perjanjian itu untuk membatalkan Perjanjian itu dan merampas wang cengkeram tersebut. Tindakan Plaintif selepas perlucutan wang cengkeram adalah untuk menunjukkan kesungguhan Plaintif agar dapat menebus kembali wang cengkeram itu. Prinsip undang-undang ialah barang sesiapa mengharapkan bantuan equity dari Mahkamah dia hendaklah terlebih dahulu
C berlaku adil, bertindak *bona fide* dan datang with clean hands. Saya dapati Plaintif tidak wajar diberi perlindungan equity. Maka saya tolak permohonannya dengan kos.

[13] On appeal the decision of the High Court was reversed. The
D Court of Appeal in the judgment rendered by Justice Hashim bin Yusoff, JCA (as he than was) said:

In this instant appeal, while there is provision in the event of a default in the payment of the balance of the purchase price, no provision is made in the event of default in payment of the
E redemption monies. It is not for the court to rewrite the SPA to provide for the omission.

That forms the basis of the Court of Appeal's finding.

[14] Learned counsel for the appellants contended that the Court
F of Appeal erred in failing to appreciate that the term "balance purchase price" should properly include the redemption sum. He relies in the main on cl. 7(a) of the SPA in support of his contention which reads:

G The *Balance Purchase Price shall first be applied towards payment of the redemption moneys, if any, due and owing by the Vendor in respect of any charge or encumbrance over the said Property.* Before payment over to the Vendor such redemption moneys at the discretion of the Purchaser be paid directly to the Chargee or body or person concerned with such encumbrance. (emphasis added)

H

[15] In this case, the agreed purchase price was RM1,600,992.20 and the deposit of RM264,992 was paid by the respondent upon the execution of the agreement, leaving a balance sum of RM1,336,000 to be paid by the respondent. Out of the balance
I sum it is agreed that the respondent shall pay the full redemption for the lands to the banks within the stipulated time. This is contained in s. 2 of the Fourth Schedule which reads:

> **The Purchaser shall pay the full redemption** for the said Property owing by the Vendor to Standard Chartered Bank Malaysia Berhad and Asia Commercial Finance (M) Berhad **within sixty (60) days from the date hereof with an extension of one (1) month.** (emphasis added)

For that reason we agree with learned counsel for the appellants that it is erroneous to treat the redemption sum as separate from the balance purchase price. In fact it constitutes the bulk of the balance purchase price.

[16] For the above reason we hold that the redemption sum forms part of the balance purchase price. Therefore, any failure on the part of the respondent to pay the redemption sum in accordance with s. 2 of the Fourth Schedule would tantamount to a failure on the part of the respondent to pay the balance of the purchase price. That certainly constitutes a breach of the SPA.

[17] What is the consequence of such breach?. This is provided in cl. 8 of the SPA which reads:

> If the Purchaser shall fail to pay the **Balance Purchase Price or any part thereof** pursuant to Clause 2 above, the amount stipulated in Section 11 of the First Schedule hereto paid by the Purchaser under Clause 1 above shall be forfeited absolutely to the Vendor as agreed liquidated damages and the Vendor shall at the time of such forfeiture refund to the Purchaser any other money paid by the Purchaser to account of the Purchase Price free of interest, whereupon this Agreement shall become null and void and of no further effect and neither party shall have any claim whatsoever against the other under or in respect of this Agreement (save the return of any documents belonging to the Vendor held by the Purchaser or the Purchaser's Solicitors) and the Vendor shall have the rights to re-sell the said Property to such person in such manner at such price and on such terms as the Vendor may think fit and the Purchaser shall have no right to any part of the purchase money thereby arising. (emphasis added)

[18] This also brings into play s. 56(1) of the Contracts Act 1950 as the parties to the SPA has agreed that time shall be of the essence of the agreement (see cl. 22 of the SPA). In the present case the respondent promised to pay the redemption sum on or before 11 July 2000 and has failed to do so at or before

A the specified time. Therefore, under s. 56(1), the agreement, or so much of it as has not been performed, becomes voidable at the option of the appellants.

[19] The appellants through their solicitor by letter dated 21 July B 2000 had given notice to the respondent to terminate the said agreement and forfeit the sum as set out in s. 11 of the First Schedule of the SPA. This in our judgment is in accord with the terms and conditions of the SPA. In support of our decision we refer to the case of *Yeow Kim Pong Realty Bhd v. Ng Kim Pong* C [1962] MLJ 118 PC. In that case, the Purchaser entered into an agreement with the Vendor for the purchase of 22 lots of lands. It was one of the terms of the agreement that an initial payment of $15,000 should be made followed by a further sum of $24,000 on or before 28 June 1956 and a final payment of $27,000 on or D before 23 December 1956. The purchaser failed to pay the stipulated $24,000 by the date specified and he was informed by the vendor that in consequence the deposit of $15,000 was forfeited and the contract was at an end. Following the failure of the purchaser to pay the second payment of $24,000, the vendor E upon request of the purchaser agreed to grant an extension for which a supplementary agreement was entered into. As the purchaser failed to abide by the supplementary agreement, the vendor terminated the agreement by writing on 1 September 1956 and forfeited the monies paid. On appeal the Privy Council held F that the supplementary agreement was binding on the parties and time was of the essence of the agreement. There was a breach of the agreement by the purchaser and the vendor was entitled to rescind the contract on 1 September 1956 as he did. (See also *Linggi Plantations Ltd v. Jagatheesan* [1972] 1 MLJ 89 PC).

G **[20]** In *Lee Yew Hin v. Kow Lup Piow* [1974] 1 MLJ 114 FC, Justice Gill, FCJ (as he then was) observed as follows:

> In my judgment, the true construction of the Agreement here is that the plaintiff was required to make his final payment to Loy H by that date. Contract differs from most other branches of the law of obligations in one important respect, namely, that generally speaking the parties themselves are free to make their own rules as to what shall and shall not bind them. (see *Chitty on Contracts* 23rd edition, page 1). The plaintiff had clearly bound himself to pay the balance of the purchase price on 20.11.1967. Once he I

had committed a breach of that agreement, the defendant was entitled to repudiate the contract and forfeit the deposit under clause 14 of the Agreement.

This further fortifies our decision in the present case.

Conclusion

[21] For the above reasons, we would answer question [a] in the positive and question [b] in the negative. The appeal is accordingly allowed and the decision of the learned High Court Judge is reinstated. Costs both here and in the courts below be awarded to the appellants. Deposit to be refunded to the appellants.